PP v. MOHAMMADREZA ASLANZAD & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
ZAKARIA SAM JCA
[CRIMINAL APPEALS NO: B-05-20-02-2015 (IRN) &
B-05-26-02-2015 (IRN)]
14 DECEMBER 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in 2,847.7g methamphetamine – Appeal against – Drugs found in apartment – Whether accused had access to apartment – Care and management of apartment – Whether presumption of occupier under s. 37(b) could be invoked – Whether trial judge considered cautioned statement – Whether trial judge breached rule against double presumption – Whether DNA found in apartment belonged to accused persons – Whether nexus between accused and drugs established – Whether trafficking proved under s. 37(d) or s. 2 – Failure of trial judge to make specific finding – Whether a misdirection – Whether evidence of chemist admissible – Exclusive power to deal with drugs – Whether accused had custody, control and knowledge of drugs – Element of possession – Whether proved – Criminal Procedure Code, ss. 182A, 402B(2) – PP v. Denish Madhavan*

EVIDENCE: *Expert evidence – Chemist report – Whether contained declaration as required under s. 402B(2) Criminal Procedure Code – Oral testimony of chemist – Whether admissible*

The respondents in Criminal Appeal No. B-5-20-02-2015 and the appellant in Criminal Appeal No. B-05-26-02-2015 were charged in the High Court for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 2,847.7g of methamphetamine. Both the appeals were heard together before this court. On the facts, ASP Nik Ezanee ('SP9') arrested the appellant at the car park of an apartment and found the access card to the lobby and the key to the apartment with the appellant. SP9 used the access card and the key to enter into the apartment and found the respondents together with SP5 in the hall. SP5 and both the respondents fled through the sliding door but were subsequently arrested outside the said apartment. The police found the said drugs and other incriminating items in a room ('room B1'). At the end of the prosecution's case, the trial judge invoked s. 37(b) and (d) of the Act and based on the presence of the DNA and fingerprints which belonged to the appellant and the respondents in the apartment, it was found that a *prima facie* case had been made out. During defence, the appellant contended that he was invited by one Mansoor to stay at the said apartment and the appellant had used several items kept in room B1 for cooking and washing which would have been the cause for the

presence of his DNA and fingerprints on the items found in the room. The appellant testified that prior to his arrest, Mansoor received a telephone call and thereafter, instructed the appellant to go down and bring his friend, Abbas, to the apartment. As such, Mansoor handed over the key and access card to the appellant. The police then arrested the appellant when he went down. The respondents, however, contended that they were merely visitors and had arrived in Malaysia the day before the arrest. The first respondent alleged that the apartment belonged to Mansoor and he had accompanied the second respondent to the said apartment on the day of the arrest. The respondents testified that when the police entered the apartment, Mansoor told them to run and the latter escaped. The first respondent alleged that his middle finger was bleeding when he was handcuffed and that was how his blood came in contact with the blanket in one of the rooms in the apartment. As for the second respondent, he alleged that he had sex with SP5 and that was how his DNA was obtained from the blanket. The trial judge found that Mansoor was a fictitious character and found the appellant guilty. The respondents, however, were acquitted and discharged. Hence, the appellant appealed against his conviction and sentence whereas the prosecution appealed against the respondents' acquittal and discharge. The issues that arose for consideration were (i) whether the trial judge breached the rule against double presumption; (ii) whether the trial judge failed to address his mind to the cautioned statement; (iii) whether the evidence of the chemist was bad in law and not admissible since the written statement of the chemist did not contain a declaration that it is true to the best of his knowledge and belief as required under s. 402B(2) of the Criminal Procedure Code ('CPC') and (iv) whether the element of possession was proved.

Held (allowing appellant's appeal; dismissing prosecution's appeal)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The DNA of the respondents was not obtained from the room where the drugs were recovered. Further, the trial judge took the correct approach as required under s. 182A of the CPC where at the end of the whole case, he had re-evaluated the prosecution's case in light of the defence. The respondents were mere visitors to the said apartment and their convictions were not safe as there was no evidence to form the nexus between the respondents and the said apartment and/or the drugs. (paras 26, 27 & 32)

(2) The first respondent's evidence that his middle finger was bleeding was not only corroborated by the second respondent but also by SP9 who admitted that he brought the appellant and the respondents to all the rooms in the said apartment and that the first respondent was bleeding when he was taken to the rooms. The second respondent's version that he did not have any knowledge of the drugs in room B1 was consistent with his cautioned statement which was recorded soon after his arrest.

It was also consistent with the cautioned statements of the first respondent and the appellant. Further, the access cards and keys to the apartment were not found on the respondents. The respondents' fingerprints were not found on the incriminating exhibits and the fingernails clippings of the respondents were negative of methamphetamine. (paras 28-31)

(3) The trial judge invoked both presumptions under s. 37(d) and (da) of the Act which was in clear breach of the principle in *Muhammed Hassan v. PP*. The trial judge also made no specific finding as to whether the prosecution had proved trafficking under s. 37(d) or s. 2 of the Act. This omission was fatal and amounted to a serious misdirection on the part of the trial judge. The access card and the key to the apartment were not sufficient to trigger the presumption of occupier under s. 37(b) of the Act. There had to be some evidence to show that the appellant had the care and management of the said apartment. In the absence of any evidence on the role of the appellant *vis-a-vis* the apartment, the learned trial judge erred in his finding that the appellant had the care and management by merely relying on the fact that the access card and the key to the apartment were found on the appellant. (paras 37, 38, 39, 41 & 43)

(4) To prove possession, the element of custody, control and knowledge must be established and there must be an exclusive power to deal with the drugs. There was no evidence led as to who was the actual tenant of the said apartment. There were DNA profiles of an unknown female and male on a towel and short pants which indicated the presence of other persons apart from the appellant and the respondents. Further, the appellant and respondents' cautioned statements pointed to the fact that the said apartment belonged to Mansoor. Thus, it could not be said that Mansoor was a fictitious character. The defence's version that Mansoor bolted when the police entered into the said apartment was not inherently incredible, given that SP5 and the respondents had managed to escape, *albeit* momentarily, through the sliding door. It was a fact that SP5 and the respondents were arrested outside the said apartment. Taking into consideration the presence of the DNA profile of the unknown male and female and applying the principles of exclusive power to deal as propounded in *Chan Peon Leon v. PP* and reiterated in *PP v. Denish Madhavan*, the element of possession had not been proved against the appellant. As such, the conviction of the appellant was unsafe. (paras 48, 50, 51, 52, 53, 54 & 55)

(5) The cautioned statement of the appellant formed part of the evidence before the court and it was the duty of the trial judge to consider the cautioned statement. However, the trial judge did not direct his mind to the cautioned statement. Hence, there was a breach of the provisions

under s. 182A of the CPC which required the court to consider all the evidence, including the cautioned statement at the conclusion of the trial. (para 44)

(6) The chemist had testified orally as to his analysis. In the circumstances, the non-compliance with s. 402B(2) of the CPC in respect of the written statement of the chemist would have no significance since the oral evidence of the chemist remained admissible. (para 47)

Bahasa Malaysia *Headnotes*

Responden-responden dalam Rayuan Jenayah No. B-5-20-02-2015 dan perayu dalam Rayuan Jenayah No. B-05-26-02-2015 telah dituduh di Mahkamah Tinggi untuk kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') kerana mengedar 2,847.7g methamphetamine. Kedua-dua rayuan didengar bersama di mahkamah ini. Berdasarkan fakta kes, ASP Nik Ezanee ('SP9') telah menangkap perayu di tempat letak kereta sebuah pangsapuri dan kad akses bersama-sama kunci pangsapuri tersebut telah dijumpai dengan perayu. SP9 telah menggunakan kad akses dan kunci itu untuk memasuki pangsapuri tersebut dan melihat responden-responden bersama-sama SP5 di ruang tamu. SP5 dan kedua-dua responden telah melarikan diri melalui pintu gelangsar tetapi kemudiannya telah ditahan di luar pangsapuri tersebut. Polis menjumpai dadah dan bahan-bahan lain yang disyaki di sebuah bilik ('bilik B1'). Pada akhir kes pendakwaan, hakim bicara membangkitkan s. 37(b) dan (d) Akta dan berdasarkan kewujudan DNA dan cap jari perayu dan responden-responden di pangsapuri tersebut, satu kes *prima facie* telah pun dibuktikan. Semasa pembelaan, perayu berhujah bahawa seorang bernama Mansoor telah menjemputnya untuk tinggal di pangsapuri tersebut dan perayu telah menggunakan beberapa barangan yang disimpan di dalam bilik B1 untuk memasak dan mencuci yang merupakan punca kehadiran DNA dan cap jari perayu ke atas barangan yang dijumpai dalam bilik itu. Perayu memberi keterangan bahawa sebelum dia ditangkap, Mansoor telah menerima panggilan telefon dan selepas itu, mengarahkan perayu untuk turun ke bawah dan membawa kawannya, Abbas, ke pangsapuri itu. Mansoor telah memberi kunci dan kad akses tersebut kepada perayu. Pihak polis kemudian telah menangkap perayu apabila dia turun ke bawah. Responden-responden, walau bagaimanapun, berhujah bahawa mereka adalah pelawat dan telah tiba di Malaysia sehari sebelum ditangkap. Responden pertama berhujah bahawa pangsapuri itu dimiliki oleh Mansoor dan dia telah mengikut responden kedua ke pangsapuri tersebut pada hari dia ditangkap. Responden-responden memberi keterangan bahawa apabila pihak polis memasuki pangsapuri tersebut, Mansoor menyuruh mereka untuk lari dan Mansoor pula telah melarikan diri. Responden pertama berhujah bahawa jari tengahnya berdarah apabila dia digari dan darahnya terkena pada selimut yang disimpan di salah sebuah bilik di dalam pangsapuri tersebut. Responden

kedua pula berhujah bahawa dia telah mengadakan hubungan seks dengan SP5 yang menyebabkan DNAnya diperolehi daripada selimut. Hakim bicara memutuskan bahawa Mansoor merupakan watak rekaan dan perayu didapati bersalah. Responden-responden pula dilepaskan dan dibebaskan. Oleh itu, perayu merayu terhadap sabitan dan hukumannya manakala pihak pendakwaan merayu terhadap pembebasan dan pelepasan responden-responden. Isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada hakim bicara memungkiri peraturan terhadap anggapan berganda; (ii) sama ada hakim bicara gagal memberi pertimbangan kepada kenyataan beramaran yang dikemukakan (iii) sama ada keterangan ahli kimia tidak boleh diterima dari sisi undang-undang memandangkan kenyataan bertulisnya tidak mengandungi deklarasi bahawa ia adalah benar dalam pengetahuan dan kepercayaannya seperti diperuntukkan di bawah s. 402B(2) Kanun Tatacara Jenayah ('KTJ'); dan (iv) sama ada unsur pemilikan dibuktikan.

Diputuskan (membenarkan rayuan perayu; menolak rayuan pihak pendakwaan)

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) DNA responden-responden tidak diperolehi daripada bilik di mana dadah tersebut dijumpai. Tambahan, hakim bicara telah membuat penemuan yang betul seperti diperuntukkan di bawah s. 182A KTJ di mana pada akhir kes, beliau telah menilai semula kes pihak pendakwaan berdasarkan pembelaan yang dikemukakan. Responden-responden merupakan pelawat di pangsapuri tersebut dan sabitan terhadap mereka tidak selamat memandangkan tidak terdapat keterangan untuk mewujudkan perkaitan di antara responden-responden dan pangsapuri tersebut dan/atau dadah.

(2) Keterangan responden pertama bahawa jari tengahnya berdarah bukan sahaja disokong oleh responden kedua malah oleh SP9 juga yang mengaku bahawa dia telah membawa perayu dan responden-responden ke semua bilik di dalam pangsapuri tersebut dan responden pertama mengalami pendarahan apabila dibawa ke bilik-bilik di situ. Versi responden kedua bahawa dia tidak mempunyai pengetahuan berkenaan dadah di dalam bilik B1 adalah selari dengan kenyataan amarannya yang direkod sejurus selepas dia ditangkap. Ia juga selari dengan kenyataan amaran responden pertama dan perayu. Tambahan, kad akses dan kunci pangsapuri tidak dijumpai dengan responden-responden. Cap jari responden-responden tidak dijumpai atas ekshibit-ekshibit yang disyaki dan keratan kuku mereka tidak mempunyai methamphetamine.

(3) Hakim bicara telah membangkitkan kedua-dua anggapan di bawah s. 37(d) dan (da) Akta yang merupakan suatu pelanggaran prinsip dalam *Muhammed Hassan v. PP*. Hakim bicara juga tidak membuat penemuan spesifik sama ada pihak pendakwaan telah membuktikan pengedaran di bawah s. 37(d) atau s. 2 Akta. Peninggalan ini adalah fatal dan terjumlah kepada salah arah yang serius oleh hakim bicara. Kad akses dan kunci pangsapuri tidak mencukupi untuk membangkitkan anggapan penghuni di bawah s. 37(b) Akta. Perlu adanya keterangan untuk menunjukkan bahawa perayu mempunyai jagaan dan pengurusan pangsapuri tersebut. Memandangkan tiada keterangan terhadap peranan perayu di dalam pangsapuri tersebut, maka, hakim bicara khilaf dalam dapatan beliau bahawa perayu mempunyai jagaan dan pengurusan dengan bergantung kepada fakta bahawa kad akses dan kunci pangsapuri tersebut dijumpai dengan perayu.

(4) Dalam membuktikan milikan, unsur jagaan, kawalan dan pengetahuan mestilah dibuktikan dan kuasa eksklusif untuk berurusan dengan dadah itu perlu ada. Tiada keterangan yang menunjukkan siapakah penyewa sebenar pangsapuri tersebut. Terdapat profil DNA seorang perempuan dan lelaki yang tidak diketahui atas tuala dan seluar pendek yang menunjukkan kehadiran orang lain selain daripada perayu dan responden-responden. Tambahan, kenyataan beramaran perayu dan responden-responden menjurus kepada fakta bahawa pangsapuri tersebut dimiliki oleh Mansoor. Oleh itu, Mansoor bukanlah watak yang direka. Versi pembelaan bahawa Mansoor telah melarikan diri apabila pihak polis memasuki pangsapuri tersebut bukanlah sesuatu yang luar biasa memandangkan SP5 dan responden-responden telah melarikan diri walaupun buat seketika melalui pintu gelangsar. Adalah suatu fakta bahawa SP5 dan responden-responden telah ditangkap di luar pangsapuri tersebut. Berdasarkan kehadiran profil DNA seorang lelaki dan perempuan yang tidak diketahui dan mengguna pakai prinsip kuasa eksklusif untuk berurusan seperti diperuntukkan dalam *Chan Peon Leon v. PP* dan diulangi dalam *PP v. Denish Madhavan*, unsur milikan tidak dibuktikan terhadap perayu. Oleh itu, sabitan perayu tidak selamat.

(5) Kenyataan beramaran perayu telah membentuk sebahagian keterangan di mahkamah dan tugas hakim bicara adalah untuk mempertimbangkan kenyataan beramaran. Walau bagaimanapun, hakim bicara tidak mengarahkan mindanya kepada kenyataan beramaran tersebut. Oleh itu, peruntukan s. 182A KTJ telah dimungkiri yang memperuntukkan supaya mahkamah mempertimbangkan segala keterangan termasuk kenyataan beramaran pada akhir perbicaraan.

(6) Ahli kimia telah memberi keterangan lisan berkenaan analisanya. Dalam keadaan ini, ketidakpatuhan s. 402B(2) KTJ berkenaan kenyataan bertulis ahli kimia tidak mempunyai kesan memandangkan keterangan lisannya kekal diterima masuk.

Case(s) referred to:
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(foll)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
PP v. Chong Wei Kian [1990] 2 CLJ 435; [1990] 2 CLJ (Rep) 690 HC ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(foll)***
PP v. Muhamad Nasir Shaharuddin & Anor [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408 HC ***(refd)***
Prasit Punyang v. PP [2014] 1 MLRA 387 ***(refd)***
Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP [2014] 4 CLJ 406 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 182A, 402B(2)
Dangerous Drugs Act 1952, ss. 2, 37(b), (d), (da)

(Criminal Appeal No: B-05-20-02-2015 (IRN))
For the appellant - Nahra Dollah (Norinna Bahadun with her); DPPs
For the 1st respondent - Amrit Pal Singh (Nashvinder Singh & Harvindar Singh with him); M/s Amrit & Company
For the 2nd respondent - Gooi Soon Seng; M/s Gooi & Azura

(Criminal Appeal No: B-05-26-02-2015 (IRN))
For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik
For the respondent - Norinna Bahadun (Nahra Dollah with her); DPPs

Reported by Kumitha Abd Majid

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] The respondents in Criminal Appeal No. B-5-20-02-2015 and the appellant in Criminal Appeal No. B-05-26-02-2015 were charged in the High Court at Shah Alam for the following offence:

> Bahawa kamu pada 22 Disember 2010, jam lebih kurang 10.30 malam, di alamat A-11-C07, Armanee Terrace, Jalan PJU 8/1, Damansara Perdana, di dalam Petaling Jaya, di dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya jenis Methamphetamine dengan berat 2847.7 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dibaca bersama dengan seksyen 34 Kanun Keseksaan yang boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952.

The Prosecution Case

[2] Briefly, ASP Nik Ezanee bin Mohd Faisal (SP9) had arrested the first accused ('the appellant') at the car park of the Armanee Terrace Apartment. The appellant had with him the access card to the lobby and the key to the apartment as in the charge ('the apartment'). Using the access card and the key, SP9 and his team entered the apartment. When SP9 opened the door and he went inside, he saw the second and the third accused (the first and the

second respondents) with Loh Lai Yee (SP5) in the hall. SP9 identified himself. SP5 and both the respondents fled through the sliding door. They were subsequently arrested outside the said apartment.

[3] Upon a search of the apartment, police found drugs and other incriminating items in the left room of the upper level of the apartment (room B1). The drugs found in room B1 were confirmed by the chemist to be 2847.7g of methamphetamine, the subject matter of the charge.

[4] At the end of the prosecution case the learned trial judge invoked s. 37(b) and (d) of the Dangerous Drugs Act 1952 (the Act) and based on the presence of the DNA and fingerprints of the appellant and the respondents in the apartment, the learned trial judge found that a *prima facie* case had been made out. The appellant and the respondents were thus called upon to enter their defence.

The Defence

[5] It was the evidence of the appellant under oath that he stayed in the said apartment for three days prior to his arrest, on the invitation of Mansoor. During his stay, he had used several items for cooking and washing which explained the presence of his DNA and fingerprints on some of the items found in room B1. The appellant stated that on the day of the arrest, the respondents came to the apartment and the second respondent's/third accused's girlfriend (SP5) also came to the apartment.

[6] The appellant further stated that prior to the arrest Mansoor had received a telephone call. Mansoor then asked the appellant to go down and bring Mansoor's friend, Abbas, to the apartment.

[7] Mansoor gave the key and the access card to the appellant. When the appellant went down to fetch Abbas, the police approached him and asked "Are you Mansoor"? The police took the key and the access card and brought the appellant to the apartment.

[8] As for the respondents, their sworn testimonies essentially were that they were mere visitors and that they had arrived in Malaysia the day before. The first respondent stated that the said apartment belonged to an individual named Mansoor and that he merely accompanied the second respondent to the said apartment on the day of the arrest. The second respondent wanted to meet the appellant, his brother-in-law, to give some money to the appellant as the appellant was short of funds.

[9] The evidence of the respondents was consistent with the appellant as regards the event that happened prior to the arrest, in particular the version that Mansoor received a phone call and thereafter the appellant was asked to go down to fetch Abbas and that the access card and key were given by Mansoor to the appellant.

[10] The respondents had also given a consistent version that when the police entered the apartment Mansoor had asked them to run. They all ran to the balcony and Mansoor escaped.

[11] The first respondent stated that his middle finger was bleeding when he was handcuffed by the police and when the police took him to the room, he was asked to sit on the bed. That was how his blood came in contact with the blanket "No. 19" found in one of the rooms. No drugs were however recovered from this particular room where the DNA of the first respondent was obtained.

[12] As for the second respondent, he stated that he had sex with his girlfriend, SP5 in the room where his DNA was found on the blanket, towel, pillow case and a few hairs in the toilet.

[13] At the conclusion of the trial, the learned trial judge found that the prosecution had proved its case against the appellant beyond reasonable doubt. In essence, the learned trial judge found Mansoor to be a fictitious character. The appellant was thus convicted and sentenced to death.

[14] As against the respondents, the learned trial judge found that a reasonable doubt had been raised on the prosecution case. The respondents were acquitted and discharged.

[15] The prosecution filed an appeal against the acquittal and discharge of the respondents while the appellant filed an appeal against his conviction and sentence. We heard the appeals together at the end of which we had unanimously dismissed the appeal of the prosecution and allowed the appeal of the appellant. Our reasons now follow.

The Appeals

[16] Learned DPP raised only one ground of appeal, namely that the learned trial judge erred in his consideration of the defence of the respondents while learned counsel for the appellant canvassed four grounds as follows:

(i) that the learned trial judge breached the rule against double presumption;

(ii) that the learned trial judge failed to address his mind to the cautioned statement;

(iii) that the evidence of the chemist is bad in law and not admissible; and

(iv) that possession was not proven.

[17] On the first issue, learned counsel submitted that there was a breach of the rule of double presumption when the learned trial judge invoked the presumption of possession under s. 37(d) at the end of the prosecution case whereas at the end of the defence case, the learned trial judge found that the appellant had failed to rebut the presumption of s. 37(da) of the DDA.

[18] It was submitted that the learned trial judge had committed further error when he failed to make a finding as regards to the element of trafficking, namely whether the prosecution had made out a case of presumed trafficking or direct trafficking.

[19] On the second issue, learned counsel submitted that there was an appealable error and a breach of s. 182A of the Criminal Procedure Code (CPC) on the part of the learned trial judge when he failed to direct his mind to the contents of the cautioned statement in analysing the defence.

[20] As regards the third issue, the complaint of learned counsel was that the written statement of the chemist was not in compliance with s. 402B(2) of the CPC which requires among others that the statement contains a declaration to the effect that the statement is true to the best of his knowledge and belief.

[21] Finally, on the issue of possession, whilst conceding that some of the items found in room B1 had the DNA profile and the fingerprints of the appellant, learned counsel highlighted that these items can be moved. The appellant had stayed in the apartment for three nights where he had done some cooking and washing. To pin the appellant to the drugs, it was submitted that the prosecution must exclude access by other persons to room B1.

Our Findings

[22] We will first deal with the appeal by the prosecution where the only complaint of learned DPP was that the learned trial judge erred in accepting the defence of the respondents.

[23] In this respect it is convenient to reproduce the relevant passages of the judgment of the learned trial judge at the end of the prosecution case which the learned DPP premised her argument:

> 36. Melalui sek. 8 Akta Keterangan 1950, kelakuan atau "conduct" "T" adalah relevan dan boleh diterima pakai sebagai menunjukkan pengetahuan "T" mengenai dadah tersebut. Kelakuan T2 and T3 adalah dengan melarikan diri daripada premis yang mempunyai dadah tersebut apabila menyedari mereka diserbu oleh pasukan serbuan. Manakala T1 pula, kesan cap jari beliau telah dikesan pada bekas-bekas yang mana disahkan oleh SP1 mempunyai kesan Methamphetamine di samping kunci-kunci rumah yang dirampas daripadanya.
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> ...
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> 43. Di dalam kes ini fakta menunjukkan kedua-dua T2 dan T3 berada di premis tempat kejadian pada masa serbuan dan telah melarikan diri apabila melihat T1 membawa pasukan serbuan ke premis tersebut. Fakta-fakta ini menunjukkan bahawa selain mereka mempunyai pengetahuan berkenaan dadah tersebut mereka juga turut mempunyai niat bersama untuk mengedar dadah tersebut jika mereka berpeluang.

...

45. Berdasarkan kepada alasan-alasan di atas, saya dengan ini memanggil ketiga-tiga "T" untuk membela diri atas pertuduhan yang dipertuduhkan terhadap mereka bertiga.

[24] Whereas at the end of the defence case, His Lordship made the following finding:

121. Bukti yang dikemukakan oleh pihak pendakwaan adalah terdapat profil DNA mereka di bilik "B2" rumah tersebut yang menunjukkan akses mereka kepada bilik tersebut. Perlu diingat bilik "B2" bukanlah bilik di mana dadah dan peralatan memproses dadah ditemui, ...

122. ... tiada apa-apa kesan cap jari kedua-dua "T" pada peralatan yang terdapat kesan dadah Methamphetamine. Mempunyai akses sahaja tidak mencukupi bagi menunjukkan yang mereka mempunyai jagaan dan kawalan ke atas dadah yang dijumpai. ...

123. Seterusnya sama ada faktor melarikan diri oleh kedua-dua "T" telah menunjukkan mereka mempunyai pengetahuan terhadap dadah tersebut? Penjelasan kedua-dua "T" ialah mereka lari kerana diminta oleh "Mansoor" untuk lari tanpa mengetahui sebab apa Mansoor melarikan diri. ...

124. Di dalam banyak kes diputuskan bahawa perbuatan melarikan diri sahaja tidak boleh menjadi satu faktor bagi menganggap pengetahuan ke atas dadah jika mereka mempunyai penjelasan yang munasabah. Rujuk kes *Alcontara a/l Ambross Anthony v. PP* [1996] 1 MLJ 209.

125. Setelah saya meneliti keseluruhan keterangan di dalam kes ini, saya berpuas hati adalah tidak selamat untuk saya mensabitkan kedua-dua "T" ini berdasarkan kepada keterangan saksi pendakwaan. Tambahan pula pada masa yang sama kedua-dua "T" mempunyai satu penjelasan yang munasabah dan boleh diterima.

126. Sama ada pihak pendakwaan telah membuktikan niat bersama oleh ketiga-tiga "T" dalam kes ini? Di peringkat *prima facie* sebelum ini saya telah mendapati bahawa terdapat niat bersama telah dibuktikan terhadap ketiga-tiga "T" ini, bagaimanapun setelah mendengar pembelaan mereka, saya berpuas hati bahawa T2 dan T3 hanyalah tetamu kepada rumah itu berdasarkan kepada alasan-alasan yang saya berikan di atas, mereka tidak dapat tahu/infer apa yang sedang berlaku di dalam rumah tersebut. Saya mendapati tidak terdapat apa-apa persepakatan di antara mereka untuk mengedar dadah tersebut, sama ada melalui "circumstantial evidence" atau keterangan langsung. Hanya perbuatan melarikan diri tidak mencukupi untuk infer satu niat bersama mereka mengedar dadah tersebut.

[25] In contending that the learned trial judge erred in his finding at the end of the defence case, learned DPP submitted that His Lordship failed to consider the fact that the DNA of the respondents were found in the room in the said apartment.

[26] We found no merit in the contention of learned DPP. As can be seen from para. 121 of the grounds of judgment, the learned trial judge had directed his mind to the issue of DNA. His Lordship had correctly found that the DNA of the respondents was not obtained from the room where the drugs were recovered.

[27] Further, we found that the learned trial judge had taken the correct approach as required under s. 182A of the CPC where at the end of whole case, he had re-evaluated the prosecution case in the light of the defence. Having done so, His Lordship was satisfied that the respondents were mere visitors to the said apartment and that the defence has raised a reasonable doubt on the prosecution case. We agreed with the learned trial judge.

[28] The evidence of the first respondent that his middle finger was bleeding was not only corroborated by the second respondent but by SP9 who admitted that he brought the appellant and the respondents to all the rooms in the said apartment and that the first respondent was bleeding when he was taken to the rooms (see RR2: p. 168; RR3: p. 300).

[29] The second respondent testified that he did not have any knowledge of the drugs in room B1. Although he was in room B3 of the apartment where he had sex with SP5, which explains his DNA on the blanket, pillow case and the hairs in the toilet of room B3, the second respondent stated that he never went to room B1 where the drugs were found.

[30] This version of the second respondent was consistent with this cautioned statement (exh. D120) which was recorded soon after his arrest. It was also consistent with the cautioned statements of the first respondent and the appellant (exhs. D121 and D118).

[31] Further, no access card and keys to the apartment were found on the respondents. There were no personal belongings of the respondents in the said apartment. Neither were there any fingerprints of the respondents found on the incriminating exhibits and the fingernails clippings of the respondents were negative of methamphetamine.

[32] Given the above, we found that the learned trial judge had not erred in law or in fact in concluding that the respondents had raised a reasonable doubt on the prosecution case. In the light of the evidence before the court, we similarly agreed with the learned trial judge that the respondents were merely visitors and that the convictions of the respondents were not safe as there was no evidence to form the nexus between the respondents and the said apartment and/or the drugs.

[33] We therefore unanimously dismissed the appeal by the prosecution and we affirmed the order of acquittal and discharge of the respondents.

[34] We will now proceed to consider the issues raised by the appellant/ first accused. A

Whether There Was A Breach Of The Rule Of Double Presumption

[35] On this issue, it is convenient to refer to the following finding of the learned trial judge at the end of the prosecution case: B

> [39] Oleh itu saya berpuas hati bahawa elemen kawalan, pemilikan dan pengetahuan adalah lengkap sepertimana dinyatakan di dalam kes *Chan Pean Leon v. PP* di atas, juga kes *Zulfikar bin Mustafah v. PP* [2001] 1 SLR 633. Maka satu inferens di bawah sek. 37(d) ADB 1952 adalah terpakai terhadap ketiga-tiga "T" memandangkan niat bersama mereka. C

[36] Whilst the learned trial judge invoked the presumption of possession and knowledge at the end of the prosecution case, it was apparent that at the end of the defence case the learned trial judge had invoked the presumption of trafficking when he stated that:

> 109. Oleh itu saya berpuas hati bahawa pembelaan T1 ini hanyalah suatu penafian kosong dan "afterthought" beliau sahaja yang mana telah gagal untuk menimbulkan suatu keraguan yang munasabah terhadap kes pendakwaan, selanjutnya telah gagal mematahkan anggapan di bawah seksyen 37(da) ADB, 1952. D

[37] Based on the above, we found merits in the submission of learned counsel for the appellant that the learned trial judge had invoked both presumptions under s. 37(d) and (da) of the Act which was in clear breach of the principle in *Muhammed Hassan v. PP* [1998] 2 CLJ 170. E

[38] The other complaint of learned counsel was on the absence of a specific finding by the learned trial judge on the element of trafficking. We found favour in the submission of learned counsel on this point. At para. 40 of the grounds of judgment, the learned trial judge said: F

> [40] Mengenai elemen pengedaran pula, keterangan menunjukkan dadah Methamphetamine tersebut adalah berjumlah 2,847.7 gram dan ia disimpan dalam bilik B1 di tingkat atas unit tersebut. Sama ada keterangan terus atau mengikut keadaan, keterangan-keterangan ini telah menjurus kepada ketiga-tiga "T" bahawa menyimpan dadah yang banyak itu untuk tujuan pengedaran. Rujuk kepada kes *Ong Ah Chuan v. PP* [1981] dan *Chan Pean Leon v. PP* (di atas) berkenaan dengan niat. G

[39] Apparent from the above quoted passage that the learned trial judge made no specific finding as to whether the prosecution had proved trafficking under s. 37(d) or s. 2 of the Act. On the authority of *Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP* [2014] 4 CLJ 406, a decision of this court which has been affirmed by the Federal Court, we found that this omission was fatal and amounted to a serious misdirection on the part of the learned trial judge. H I

[40] Further, we found that the learned trial judge had also invoked the presumption under s. 37(b) in coming to the conclusion that the appellant had custody, control and knowledge of the drugs in room B1. The relevant portion of the grounds of judgment is reproduced below for ease of reference:

> 25. Sek. 37(b) ADB, 1952 berbunyi berikut:
>
> > a person, until the contrary is proved, shall deemed to be the occupier, of any premises, if he has, or appears to have, the care and management of such premises.
>
> 26. Apa yang dimaksudkan oleh undang-undang "care" or "management" adalah merupakan suatu persoalan fakta di dalam sesuatu kes itu. Semata-mata hadir ke dalam satu premis tidak boleh termasuk di dalam erti kata "care" atau "management" kepada premis itu. … Pada kebiasaannya mahkamah akan menerima anggapan di bawah s. 37(b) ini dengan penuh berhati-hati …
>
> 27. Berbalik kepada kes ini, fakta yang tidak dipertikaikan ialah semasa T1 ditangkap di tingkat bawah kondominium tersebut turut ditemui bersama-samanya ialah kad kunci kepada premis tersebut dan kunci kepada unit tersebut. Selain itu profil DNA T1 turut ditemui pada beberapa item di unit tersebut khususnya di dalam bilik pertama di tingkat atas.

[41] In our view, the access card and the key to the said apartment is not sufficient to trigger the presumption of occupier under s. 37(b) of the Act (see *PP v. Chong Wei Kian* [1990] 2 CLJ 435; [1990] 2 CLJ (Rep) 690; [1999] 3 MLJ 165; *PP v. Muhamad Nasir Shaharuddin & Anor* [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408). There had to be some evidence to show that the appellant had the care and management of the said apartment, for example that the appellant was the tenant of the said apartment or that the appellant had paid for the rentals.

[42] The evidence led by the prosecution revealed that the landlord, Abdul Razak bin Mohd Kadir (SP4) let out the apartment to one Mr Lee, a Malaysian and the rentals were paid through an estate agent. The estate agent, Ong Yee Min (SP11) testified that one introducer, Loh Lai Yee introduced the tenant to him. According to SP11, the keys to the said apartment were given to a male Chinese. No evidence was led as to who was this male Chinese.

[43] Having regard to the above and the absence of any evidence on the role of the appellant *vis-a-vis* the apartment, we were of the view that the learned trial judge erred in his finding that the appellant had the care and management by merely relying on the fact that the access card and the key to the apartment were found on the appellant. Whether the learned trial judge failed to consider the cautioned statement.

[44] It is trite that the cautioned statement of the appellant formed part of the evidence before the court and that it was the duty of the trial judge to consider the cautioned statement. Having perused the grounds of judgment, we found that nowhere in the grounds did the learned trial judge direct his

mind to the cautioned statement. We therefore found merits in the submission of learned counsel that there was a breach of the provisions of s. 182A of the CPC which requires the court to consider all the evidence before it which includes the cautioned statement at the conclusion of the trial (see *Prasit Punyang v. PP* [2014] 1 MLRA 387).

Whether The Evidence Of The Chemist Was Inadmissible

[45] Section 402B(2) of the CPC reads:

> (2) A statement may be tendered in evidence under subsection (1) if:
>
> (a) the statement purports to be signed by the person who made it;
>
> (b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief; and
>
> (c) a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings not later than fourteen days before the commencement of the trial unless the parties otherwise agree.

[46] We noted that the written statement of the chemist did not contain a declaration that it is true to the best of his knowledge and belief (RR9: 885). Learned DPP conceded that non-compliance with s. 402B(2) of the CPC will render the written statement of the chemist inadmissible. Nevertheless it was the submission of learned DPP that the chemist had testified orally. Hence even if the written statement of the chemist were to be ignored, the oral evidence of the chemist could be relied upon.

[47] We agreed with learned DPP. We found from the record of appeal that the chemist had in fact testified orally as to his analysis. In the circumstances, the non-compliance with s. 402B(2) of the CPC in respect of the written statement of the chemist would have no significant as the oral evidence of the chemist remained admissible.

Whether Possession Had Been Proven

[48] It is trite that to prove possession, the element of custody, control and knowledge must be established and that there must be an exclusive power to deal with the drugs (see *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237; *PP v. Denish Madhavan* [2009] 2 CLJ 209; [2009] 2 AMR 757).

[49] Learned counsel had submitted that the learned trial judge erred when he found that the appellant was in possession of the drugs without considering the element of exclusivity.

[50] It cannot be denied that there was no evidence led as to who was the actual tenant of the said apartment. SP5 testified that there were six to seven persons in the said apartment. This evidence was consistent with the DNA report exh. P66 which show the DNA profile of an unknown Female 1 and unknown Male 1 on a towel and short pant respectively (RR10: p. 945), clearly indicates the presence of other persons apart from the appellant and the respondents.

[51] More pertinent would be the cautioned statements of the appellant and the respondents (exhs. D118, D120, D121 at RR 10: pp. 991, 996, 997(c)), all pointing to the fact that the said apartment belonged to Mansoor. The following evidence was elicited during cross examination of the investigating officer, Inspector Mohd Zulkifli bin Rasid (SP16) (RR4: p. 369):

S: Katakan: Abbas bawa polis ke rumah Mansor, tetapi Mansor panggil OKT 1 untuk turun dan jemput Abbas?

J: Tak setuju.

S: Kamu tahu kenapa Abbas bawa polis ke situ?

J: Saya ada ambil statement daripada Abbas.

S: Saya katakan Abbas bawa polis ke tempat kejadian untuk berjumpa Mansor?

J: Saya pohon merujuk kepada keterangan Abbas.

P.B. Saya tiada bantahan

Mah: Dibenarkan

Selepas melihat Statement 112.

Saya bersetuju. Dia adalah tangkapan berkaitan kes lain.

[52] In the light of the above evidence, it could not be said that Mansoor was a fictitious character.

[53] It was the appellant's version that Mansoor was in the said apartment when the police raided the apartment but that Mansoor had escaped. In our view, the defence version that Mansoor had bolted when the police entered the said apartment was not inherently incredible, given that SP5 and the respondents had managed to escape, *albeit* momentarily, through the sliding door. It was a fact that SP5 and the respondents were arrested outside the said apartment, as testified by SP9 and D/L/Kpl Mohd Noor Izham bin Mohd Pandi (SP8).

[54] Taking into consideration the presence of DNA profile of unknown male 1 and unknown female 1 and applying the principles of exclusive power to deal as propounded in *Chan Pean Leon*, (*supra*) and reiterated in *Denish Madavan*, (*supra*) we were of the unanimous view that the element of possession had not been proven against the appellant.

[55] Having regard to all the above, we found that the conviction of the appellant was unsafe. We therefore unanimously allowed the appeal and we set aside the conviction and sentence imposed by the High Court. The appellant was acquitted and discharged.